Kluwer Mediation Blog

Beyond the EU Directive On Mediation: Solving National Problems at a National Level

Cornel Marian (Stockholm Arbitration & Litigation Center (SALC)) · Saturday, December 17th, 2011

No one expected that the implementation of the EU Mediation Directive would come about easily(1). The recent report from the European Parliament on the implementation of the EU Mediation Directive attests to the difficulties encountered by Member States in implementing the Directive(2). The Report illustrates the uphill battle faced by the mediation community as a whole on developing uniform rules that apply across jurisdictions.

The Revelations of the EU Report on the Implementation of Mediation Directive

On the issue of scheduled implementation, the Mediation Directive has encountered considerable obstacles in meeting the 21 May 2011 deadline(3). At the time of the EU Report, four countries have failed to report compliance with the Directive. These four countries include Sweden.

Sweden has made great strides in adopting the Directive. It has passed a comprehensive law on mediation and after lengthy debate and government proceedings—the law has been adopted in the last hours of the legislative session in the Swedish Parliament last year(4). Despite the progress in implementation, the EU Parliament reported that Sweden still did not comply with the requirements of the Directive.

The Directive sets out comprehensive provisions on among other things:
(1) confidentiality; (2) court mandated mediation, and (3) the effect of the prescription periods/statutes of limitations. Despite its ambitious goal of promoting mediation uniformly among all member states, the Directive provides that the European Commission will have until May 2016 to present a final report on the implementation of the Directive.

The foreseeable 2016 report envisions an analysis of “the development of mediation throughout European Union and the impact of the Directive in the Member States.”(5) Moreover, “if necessary, the report shall be accompanied by proposals to adapt the Directive.”(6) In anticipation of that report, it is important to stress the importance of national differences that are rooted in geopolitical traditions and litigation practices.

For the most part, the international the mediation regime does not have a uniform supra-national instrument that normalizes cross-border rules akin to the powerful 1958 New York Convention on the Enforcement and Recognition of Final Arbitration Awards. New EU Member States, such as Bulgaria and Romania, eagerly embraced and radically modified its legislation to comply with the

European Directive (7). Their harmonization steps are not all that surprising.

New EU Member States are under considerable pressure, both internally and externally, to harmonize their legislatures with the European legislative standards. As laudable as the initiatives of the new Member States are, the more established members of the European Union are likely to be somewhat reserved in their initiatives. Given the current challenges that the European Union is facing, individual states may likely guard themselves against European initiatives that are sweeping in nature.

Making Mediation an Attractive Substitute to Court Proceedings

The foundational question in Sweden, as well as in many other states, centers on making mediation an attractive substitute to court proceedings when court proceedings are imperfect but functional. Each Member State has its procedural peculiarities and Sweden is of no exception. In Sweden, for instance, parties have always at their disposal court supervised mediation. The Swedish legal culture in Sweden may be unique in that a party may opt for mediation with the same judge presiding over the case.

Because Swedish parties entrust judges with considerable discretion, the judge may call upon both parties to negotiate the settlement of a dispute ("Stockholm" model). Under the "Gothenburg model", the judge may ex parte meet with one party and indicate that a matter may be best settled. These unique features of the litigation regime in Sweden make mediation difficult to be a viable alternative to court-litigation or court-supervised mediation. The costs of proceedings are an important starting point.

The costs for court settlement proceedings are never borne by the parties but are instead absorbed by court fees, which are lower in comparison to the costs incurred in having a qualified mediator. To contrast that, there are always administrative costs associated with mediation and as modest as these are, they are factored in relation to the benefits of mediation. Two solutions exist to normalize for the judges participating actively in settlement discussions: either the court picks up the cost of mediation proceedings or the court begins charging for and separating its functions of serving as mediator.

These innate characteristics of national regimes are far deeper than the scope of the EU Mediation Directive and as the practice in Italy has indicated, sweeping national measures may jeopardize the implementation of harmonized rules(8). When moving forward, legislators need to remember that at the core of the Mediation Directive is the express scope of providing easier access to justice(9). To achieve such results, the examination of national differences shall necessarily be given full credit in the context of EU norms. National regimes, in turn, ought to develop their sole tools to remedy any national peculiarities. On this latter point, the attention shall not be on the instruments advanced by the European Union. Instead, it is our responsibility as practitioners to come with practical solutions at the local level.

1. Directive 2008/52/EC of the European Parliament and of the Council 21 May 2008 of certain aspects of mediation in civil and commercial matters (hereinafter Mediation Directive).
2. European Parliament resolution of 13 September 2011 on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts, 2011/2026(INI), (Sept. 13, 2011) (hereinafter the EU Report).
3. Mediation Directive art. 12.
4. Swedish Justice Department, Government Proposition 2010/11:128 "Mediation and Conciliation

– increased opportunities to agree," 14 April 2011, available http://www.ud.se/sb/d/13654/a/166631 (in Swedish original, last access: 29 April 2011).
5. Mediation Directive art. 11.
6. Id.
7. EU Report, para. 9.
8. Owen Bowcott, Compulsory mediation angers lawyers working in Italy's unwieldy legal system, http://guardian.co.uk, (May 23, 2011).
9. See generally EU Report, para. I. EU's Stockholm Programme, which seeks to ensure that European citizens fully exercise their rights and benefit from the European integration, envisions the implementation of the Mediation Directive with the express scope of providing easier access to justice. European Commission, Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM(2010) 171 final, at 2 & 24 (Apr. 20, 2010). http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:EN:PDF

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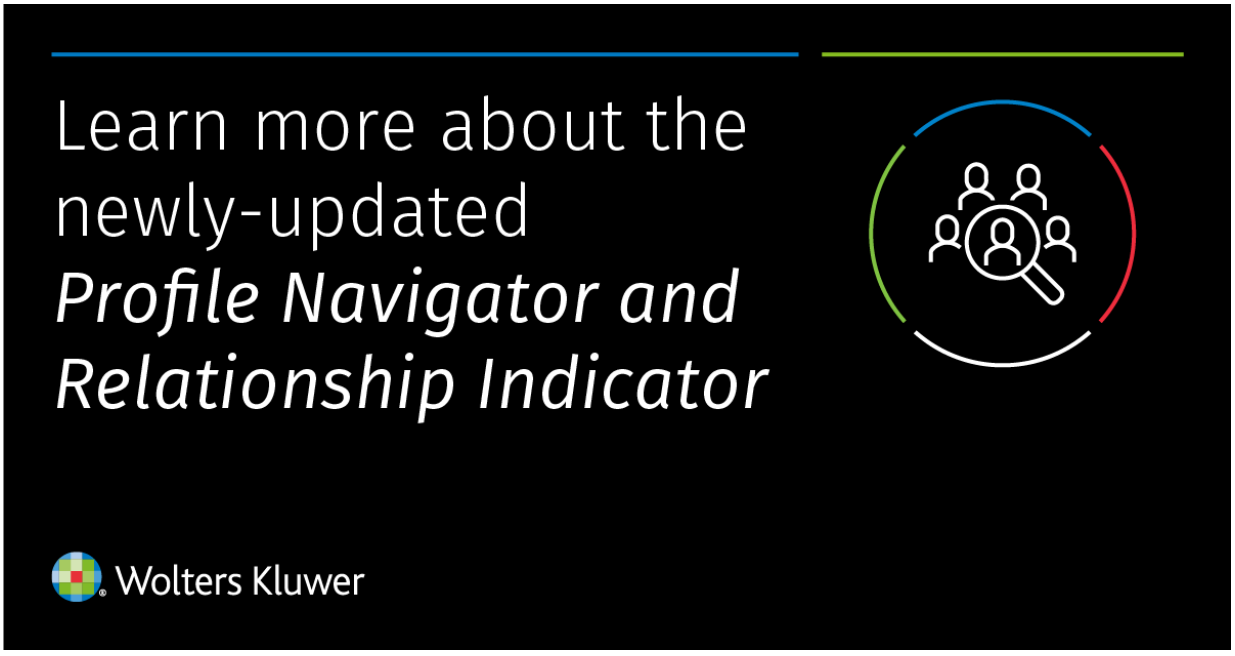

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